Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
BellSouth Emergency Petition for	)	
Declaratory Rule and Preemption of	)	WC Docket No. 04-245
State Action	)	
	)	

OPPOSITION OF THE NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS

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The National Association of Regulatory Utility Commissioner (NARUC) respectfully opposes *BellSouth's Emergency Petition for Declaratory Rule and Preemption of State Action* filed July 1, 2004 in the above-captioned proceeding. NARUC[1] is a quasi-governmental nonprofit organization, founded in 1889, that represents those government officials in all fifty States, the District of Columbia, Puerto Rico, and the Virgin Islands charged with overseeing the operations of telecommunications providers operating within their respective jurisdictions.

BellSouth argues the Tennessee Regulatory Authority (TRA) "illegally assert[ed] [§271] enforcement authority," *Petition* at 1, when it set an interim rate for a service the Bell Operating Company (BOC) is clearly required by Section 271 to offer. The TRA action was taken during the course of an arbitration covering over 70 issues. BellSouth's petition is deficient on its face, inconsistent with the controlling statutory text, and was filed prematurely in the wrong forum. The Federal Communications Commission (FCC) should dismiss the petition in favor of a proper appeal of the TRA's order to federal court.

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[1] Both the U.S. Congress and federal courts have recognized that NARUC is a proper party to represent the collective interests of State regulatory commissions. See, e.g., 47 U.S.C. §410(1986), where Congress calls NARUC "the national organization of the State commissions" responsible for economic and safety regulation of the intrastate operation of carriers and utilities. Cf, 47 U.S.C. § 254 (1996). See, also, *USA v. Southern Motor Carrier Rate Conference, et al.,* 467 F.Supp. 471 (N.D. Ga. 1979), aff. 672 F.2d 469 (5th Cir. Unit "B" 1982); aff. en banc, 702 F.2d 532 (5th Cir. Unit "B" 1983, rev'd, 471 U.S. 48 (1985). See, also *Indianapolis Power and Light Co. v. ICC*, 587 F.2d 1098 (7th Cir. 1982).

In support of this opposition, NARUC states as follows:

I. BellSouth's Petition is Premature.

As a preliminary matter, the petition is premature. The company is seeking review of a State order that has yet to be released. As a basis for the appeal, BellSouth offers only the transcript of the TRA's hearing. The Authority is in the process of drafting a detailed final order. A proper analysis of the BellSouth request cannot take place without an examination of the complete TRA rationale for its actions that will be provided in detail in a final TRA order.[2] Given the key role assigned States by Congress, the obvious necessity arising from the 1996 legislation[3] for cooperative/coordinated FCC-State actions, the multiple reservations in the Act of State authority, the FCC should delay further action in this docket at least until the text of the decision is released. There is no danger of precipitous TRA action. As BellSouth concedes in its petition, the rate established is only an interim one and is "subject to a true-up at the conclusion of a generic docket conducted by the TRA or the conclusion of successful commercial negotiations." *BellSouth Petition* at 3–4.

II. The Act requires Appeals of Arbitrations to be filed in Federal District Court.

Second, BellSouth has chosen an inappropriate legal remedy. There is no question that BellSouth is appealing a State decision reached in an arbitration conducted pursuant to §252. As argued, infra, NARUC contends there has been no showing that the TRA's action is inconsistent with any FCC order or the express terms of the statute. However, assuming arguendo, the company's charges have merit, the FCC is not the proper place to seek resolution. The Act, in

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2 Compare *Consumer Advocate Division v. Tennessee Regulatory Authority; Nashville Gas Co.*, Appeal No. 01-A-01-9708-BC-00391, Court of Appeals of Tennessee, at Nashville, 1998 Tenn. App. LEXIS 428 (Filed July 1, 1998) ["[F]indings of fact and conclusions of law are a necessary requirement for a meaningful review of an administrative agency's decision. See *Levy v. State Bd. of Examiners for Speech Pathology & Audiology*, 553 S.W.2d 909 (Tenn. 1977)."]

3 *Telecommunications Act of 1996*, Pub. L. No. 104-104, 110 Stat. 56 (1996) (Act).

§252(e)(6) specifies that federal district courts are the appropriate forum " . . . to determine whether the agreement or statement [approved by a State] meets the requirements of section 251 and this section." {Emphasis Added}[4] Courts have confirmed the clear Congressional intent embodied in §252(e)(6).[5]

III. BellSouth's Contentions That The TRA Exceeded Its Authority Is Inconsistent With The Statutory Text And Existing Precedent.

BellSouth's arguments ignore both the text of the Act and Congressional intent. The requirements of 47 U.S.C. §252(c)(2) are clear. In arbitrations, States are to set rates for elements that are the focus of *any* interconnection agreement. All interconnection agreements that involve *any* of the duties specified in §251(a) *and (b)* "shall be submitted to a State commission under subsection (e)."[6] Those listed §251 duties, and the State delegated authority to arbitrate, are nowhere limited to network elements provided pursuant to §251(c)(3).

The subject arbitration involved points of disagreement on seventy-one issues. There is no provision in the statute that requires States to subdivide § 252 interconnection arbitrations into (i) negotiations that address rates/terms for the interconnection obligations of §251(b) or specific §251(c)(3) unbundled network elements and (ii) those that also cover rates/terms for elements

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[4] 47 U.S.C. §252(a)(1).

[5] See *MCI Telecommunications Corp v. Bell Atlantic-Pennsylvania*, 271 F.3d 491, 511 (3rd Cir. 2001); *GTE North v. Strand*, 209 F.3d 909 (6th Cir. 2000); *MCI Telecommunications Corp. v. Illinois Bell Telephone Co*., 222 F.3d 323, 337 (7th Cir. 2000) ("Congress envisioned suits reviewing actions by State commissions…and…intended that such suits be brought exclusively in federal court."). See also *Qwest Communications International Inc. Petition for Declaratory Ruling on the Scope of the Duty to File and Obtain Prior Approval of Negotiated Contractual Arrangements under Section 252(a)(1)*, WC Docket No. 02-89, Memorandum Opinion and Order, 17 FCC Rcd 19337 (2002) at n. 23, where after stating: "As an example of the substantial implementation role given to the States, throughout the arbitration provisions of section 252, Congress committed to the States the fact-intensive determinations that are necessary to implement contested interconnection agreements," – the FCC cites to 47 U.S.C. §252(e)(5) specifying that section directs the FCC "to preempt a State commission's jurisdiction only if that State commission fails to act to carry out its responsibility under section 252." The TRA did not fail to act in the proceeding below.

[6] 47 U.S.C. §252(a). Note - 47 U.S.C. §251(c)(1) specifies that the duty to negotiate "in good faith in accordance with section 252 of this title, the particular terms and conditions of agreements to fulfill *the duties described in [part b]*." {Emphasis Added}

that must otherwise be provided pursuant to §271.[7] Nor would it be logical to do so. Indeed, §252(a)(1) makes clear that interconnection agreements must specify *all* the rates and the specific services or network elements to be provided.

The language of the statute is clear and specific: States "shall resolve each issue set forth in the petition." 47 U.S.C. §242(b)(4)(C). Far from precluding States from evaluating and establishing the rates for network elements provided pursuant to §271, Congress explicitly required BellSouth, and the other BOCs to offer §271 network elements pursuant to interconnection agreements (or, where no competitor has sought interconnection, pursuant to Statements of Generally Available Terms and Conditions), approved in accordance with §252 of the Act.[8] Congress specified that the scope of open issues presented for arbitration under §252

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[7] In *Coserv LLC et al. v. Southwestern Bell et al.*, 350 F.3d 482, 487-488 (5th Cir. 2003), the Court noted: "*There is nothing in §252(b)(1) limiting open issues only to those listed in §251(b) and (c)*. By including an open-ended voluntary negotiations provision in §252(a)(1), Congress clearly contemplated that the sophisticated telecommunications carriers subject to the Act might choose to include other issues in their voluntary negotiations, and to link issues of reciprocal interconnection together under the §252 framework. In combining these voluntary negotiations with a compulsory arbitration provision in §252(b)(1), Congress knew that these non-251 issues might be subject to compulsory arbitration if negotiations fail. That is, Congress contemplated that voluntary negotiations might include issues other than those listed in §251(b) and (c) and still provided that any issue left open after unsuccessful negotiation would be subject to arbitration by the PUC. We hold, therefore, that where parties have voluntarily included in negotiations issues other than those duties required of an ILEC by §251(b) and (c), those issues are subject to compulsory arbitration under §252(b)(1). *The jurisdiction of the PUC as arbitrator is not limited by the terms of §251(b) and (c); instead, it is limited by the actions of the parties in conducting voluntary negotiations.* It may arbitrate only issues that were the subject of the voluntary negotiations. The party petitioning for arbitration may not use the compulsory arbitration provision to obtain arbitration of issues that were not the subject of negotiations . . . . An ILEC is clearly free to refuse to negotiate any issues *other than those it has a duty to negotiate under the Act* when a CLEC requests negotiation pursuant to §251 and 252." [Emphasis added]

[8] When Congress determines to vest sole jurisdiction with the FCC for setting rates otherwise traditionally subject to State review, the statutory text is explicit. In 1996, Congress had little difficulty specifying preemption of State authority with respect to payphone rates at 47 U.S.C. §276. Cf. Illinois *Public Telecommunications Association v. FCC*, 117 F.3d 555 (D.C. Cir 1997), clarified on rehearing, 123 F.3d. 693, cert. denied, 523 U.S. 1046 (1998). Similarly, at 47 U.S.C. § 332, Congress specified States could not regulate the retail rates of commercial mobile radio service without first getting the FCC's permission and limited States to their existing authority to oversee "other terms and conditions" of such services. Congress did not establish a similar jurisdictional division in § 271. Indeed, the structure and logic of the scheme advanced in 1996, as well as the mandatory instructions for State action in arbitrations, compels the contrary conclusion, particularly when viewed in light of the multiple specific reservations of State authority. See e.g. 47 U.S.C. §251(d)(3) ("Preservation of State access regulations"); § 252(e)(3) ("Preservation of authority": "nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of an agreement"); §261(b) (preservation of State regulatory powers to fulfill requirements of local competition requirements); §261(c) (no preclusion of State regulation "for intrastate services that are necessary to further competition in the provision of telephone exchange service or exchange access, as long as the State's requirements are not inconsistent with this part or the

specifically includes "issues on which incumbents are mandated to negotiate."[9] There is no question that switching is an element which BellSouth, and the other BOCs, are mandated to negotiate pursuant to §271(c)(2)(B)(vi).[10]

While the Supreme Court found in *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366 (1999) (*Iowa*) that the Act is "not a model of clarity," two things were clear: (1) when interconnection agreements are negotiated, they are to be submitted to State commissions for approval, but if negotiations fail, "either party can petition the State commission . . . to arbitrate open issues." 525 U.S. at 373-374, and (2) with respect to rates established in such arbitrations "[i]t is the States that will . . . determine[] the concrete result in particular circumstances."[11]

That is exactly what happened here. Both the Act and Supreme Court precedent make clear that State actions, like the rate-setting undertaken by the TRA in the context of an arbitration, that are consistent with any applicable FCC pricing standards, must be upheld. The TRA was undoubtedly (i) acting pursuant to specific State authority reserved under 47 U.S.C. § 252(d) and (ii) carrying out the specific role Congress delegated to the States in 47 U.S.C. § 252.

Commission's regulations to implement this part"); 1996 Act, §601(c), 110 Stat. at 14 (the 1996 Act "shall not be construed to modify, impair, or supersede Federal, *State*, or local law unless *expressly* so *provided* in such Act or amendments.") (uncodified note to 47 U.S.C. §152) {Emphasis added}.

[9] *MCI v. BellSouth*, 298 F.3d 1269, 1274 (11th Cir. 2002).

[10] Indeed, in *Qwest Communications International Inc. Petition for Declaratory Ruling on the Scope of the Duty to File and Obtain Prior Approval of Negotiated Contractual Arrangements under Section 252(a)(1),* WC Docket No. 02-89, Memorandum Opinion and Order, 17 FCC Rcd 19337 (2002), at ¶ 3, the FCC rejected Qwest's view that "agreements regarding matters not subject to sections 251 or 252 (e.g., interstate access services, local retail services, intrastate long distance, and network elements that have been removed from the national list of elements subject to mandatory unbundling" are not required to be included in interconnection agreements filed with the States. Section 252 creates a broad obligation to file agreements, subject to a few narrow exceptions that do not exempt §271 elements. That order makes clear that any agreement addressing ongoing obligations involving network elements – like those involved in this proceeding – must be incorporated in interconnection agreements subject to the §252 review process. To the extent there is any question regarding those obligations, the FCC said State commissions are to decide the issue. Id. at ¶ 10.

[11] *Iowa*, 525 U.S. at 384 ("[Section] 252(c)(2) entrusts the task of establishing rates to the State commissions . . . It is the States that will apply those standards and implement that methodology, determining the concrete result in particular circumstances.").

Moreover, the actions the agency took were clearly designed to enhance Congress's goal of promoting competitive entry[12] and were consistent with both the record presented to it for decision and the 'just and reasonable' pricing standard adopted by the FCC in the *Triennial Review Order.*[13] BellSouth and ITCDeltacom sought State arbitration when negotiations broke down. This is precisely the process specified by Congress. Nothing in BellSouth's petition demonstrates that the TRA acted improperly in setting a rate for a disputed element in the course of the Congressionally mandated arbitration proceeding. The petition must be rejected.

CONCLUSION

For the foregoing reasons, NARUC requests that the FCC deny BellSouth's petition.

Respectfully Submitted,

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[12] Section 251(d)(3) permits the States to establish regulations that do not conflict with the requirements of section 251, and expressly precludes the FCC from impeding State regulations. The declaration of State authority in this section is expressly noted and is not a grant of delegated authority that the Commission can usurp through declaratory ruling by taking action outside of its narrowly-tailored preemption authority contained in section 253(d). Section 251(d)(3) by its definite terms does not require all State access and interconnection regulations to be coextensive with the FCC's regulations published under section 251. Section 251(d)(3)(C) prevents the States from adopting regulations that would "substantially prevent" the opening of the ILEC's networks to competitive carriers under the Commission's orders. Section 251(d)(3) reveals explicit Congressional intent to preserve State authority to adopt pro-competitive regulations, even where the Commission has not done so. In fact, in the *Iowa Util. Bd v. FCC* (120 F.3d 806) arbitration, the Eighth Circuit Court of Appeals held that section 251 (d)(3) "constrains the FCC authority" to preempt State access and interconnection obligations.

[13] See *In re Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 F.C.C.R. 16798 (2003), corrected by *Errata*, 18 F.C.C.R. 19020 (2003) ("*TRO*"), at ¶¶ 470, 662-663. Contra the claims of BellSouth's petition, in *United States Telecom Ass'n v. FCC*, 359 F.3d 554, 565-69 (D.C. Cir. 2004) and in the TRO, the Court and the FCC were addressing the appropriate pricing standard, not discussing the role of either the Commission or the States in evaluating rates.